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Publikation im Rahmen des ERC Projektes

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This project has received funding from  
the European Research Council (ERC)  
under the European Union's Horizon  
2020 research and innovation  
programme (ERC-2014-CoG, No.  
647313-Tansnational Force of Law,  
Andreas Fischer-Lescano)



**European Research Council**

Established by the European Commission

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# FRANZ KAFKA'S CRITIQUE OF LEGAL VIOLENCE

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## CRÍTICA DE FRANZ KAFKA SOBRE A VIOLÊNCIA DO DIREITO

**ABSTRACT:** The interweaving of Kafka's biography, his legal and his literary work is commonly underestimated, but has to be considered to bring into relief Kafka's concept of law. It is argued that from Kafka's writings we can extract a concept law which is critical of law's link with state power and violence. But Kafka is not a legal nihilist; his work is rich of evidence of his hope for a just and non-violent law. Such a law, it is concluded with reference to Kafka's work, would have to be an ascetic law, result of 1) the overcoming of modern law's subjectivity, 2) the establishment of self-restraint and 3) respect for different forms of law and for singularity.

**Keywords:** Deconstruction. Violence. Critique of law. Subjectivity. Justice.

**RESUMO:** O entrelaçamento da biografia de Kafka. Os textos jurídicos e literários de Kafka são comumente subestimado, mas fundamentais para a compreensão da concepção de direito de Kafka. O argumento é que, a partir dos escritos de Kafka, podemos extrair um conceito de direito que é uma crítica à ligação do direito com o poder estatal e a violência. Mas, Kafka não é um niilista quanto ao direito; seu trabalho é rico de provas de sua esperança em um direito justo e não violento. Tal direito, como se pode concluir da obra de Kafka, teria que ser uma lei ascética, resultado de: 1º) superação da subjetividade do direito moderno, 2º) estabelecimento de auto-contenção e 3º) respeito pelas diferentes formas de direito e sua singularidade.

**Palavras-chave:** Desconstrução. Violência. Crítica do direito. Subjetividade. Justiça.

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## 1 INTRODUCTION

Franz Kafka, who held a doctorate in law, worked for many years as a lawyer at the Workmen's Accidents Insurance Institute of the Kingdom of Bohemia in Prague (EICHENHOFER, 1997, p. 9). According to the somewhat possessive assessment of his colleagues, he was, however, not merely one of the "most significant insurance lawyers in Europe" (HERBER; LIMBERGER, 2015, p. 145). Rather, the lawyer-poet's *literary* work is regularly treated as an embellishment of legal studies. Herbert Rosendorfer, for example, writes that it should "fill all jurists with pride to know that one of the greatest writers in the German language was a colleague" (ROSENDORFER, 1983, p. 1158-1163). It is not without irony that mainstream jurisprudence should kowtow before Franz Kafka. For he engaged in a lifelong quarrel with legal practice, his literary work rife with criticisms of the legally regulated world. Kafka's critiques of law are not only the result of an accidental overlap of the writer's literary and official profession. Such a two-life theorem, as put forward, for example, by Richard Posner, separates artificially Kafka's professional work as a "normal" civil servant (POSNER, 2010, p. 207) from his life as a writer (MUSHLIN, 2015, p. 571).

Kafka was not a bureaucratic functionary at daytime and at night time a genius writer. Just the contrary: Franz Kafka – the Kafka who is worshiped by a now seemingly industrial complex of Kafkalogues, above all literary studies academics<sup>2</sup> – was the most radical critic of legal practice. His official writings bear rich material of a legal critique using legal techniques of argumentation. Kafka's literature radicalizes this critical approach adopting an exterior perspective. In sum his official and literary writings expose Kafka as a "disputatious lawyer" par excellence (JUSTIZ, 1988, p. 11-13)<sup>3</sup>. In *The Castle*, Kafka writes that work and life are more intertwined than ever before, "so much so that sometimes it

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<sup>2</sup> Kafka's works are the object of big business: horrendous sums are paid for single letters, Kafka-themed fashion items flood the market, and an absurd dispute has flared up concerning a portion of his unpublished writings (BUTLER, 2011).

<sup>3</sup> Dispute does not merely serve to divide, but also to unite. This is captured in the definition of "combative" [streitbar] found in Grimm's Dictionary, where, alongside a series of less surprising adjectives, there is also a gesture to agnosticus – "belonging to competition". Furthermore, Georg Simmel's sociological account of dispute defines it as a "synthesis of elements, an opposed-to-one-another that belongs with the for-one-another under one higher concept (SIMMEL, 2009, p. 227). To argue disputatiously is always at the same time to engage with the other.

almost seemed as if life and official duties had changed places” (KAFKA, 2009, p. 55). This is true also for his own life. Kafka studied law and worked as a lawyer. His literary work takes jurisprudence as its central object. Literature and law, writing and the realities of life are intimately bound up with one another in Kafka’s works (BUCK-HEEB, 2006, p. 223). In order to make this “interweaving”<sup>4</sup> clear and to understand its impact on Kafka’s radical critiques of law, I begin with a biographical account of Kafka’s entry into the world of law, i.e. his student years (section 2); his work in workers’ accident insurance (section 3); and the connections to concrete questions of legal doctrine, on the one hand through Kafka’s own “office writings”, and on the other through the reception of his works in the world of jurisprudence (section 4). Finally, I reconstruct Kafka’s critique of law as it unfolds in his literary works (sections 5 and 6). In doing so, I will argue that we can read Kafka as a “disputatious lawyer” who offers in his writings a radical critique of legal violence that aims at a transvaluation of values: Kafka pleads for an ascetic law, a law that is sensitive to the needs of humanity; a law that becomes a non-violent force for human and societal emancipation.

## 2 “LAW WAS THE OBVIOUS CHOICE”

Franz Kafka – whose Hebrew name he shared with his Grandfather: Anshel (latin *angelus*) – was born on 3<sup>rd</sup> July 1883, the first child of Jewish salesman Hermann Kafka and his wife Julie Kafka, *nee* Löwy<sup>5</sup>. While Kafka’s father grew up in a small village in South Bohemia and began his working life as a travelling salesman, Kafka’s mother came from a respected German-Jewish cloth trading and farming family, with a far higher level of education. His father’s ambition to climb the social ladder, which carried him from the position of goods peddler to that of a salesman, shaped Kafka’s youth. In the Kafka family, it was the father who called the shots on questions of education. It was his decision that Kafka should study at a German *Volksschule*, or state school. This was typical of the *Zeitgeist* of the aspiring middle classes in Prague, who sought to compensate for the

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<sup>4</sup> “Interweaving” here translates the German term *Verhkelung*. On this concept, see Fabian Steinhauer (2015, p. 22).

<sup>5</sup> Of the countless biographies of Kafka, the following are of particular merit: STACH, 2014; STACH, 2013a; STACH, 2013b; ANZ, 2009; WAGENBACH, 2006.

disadvantages suffered by Jews at the time through education (ANZ, 2009, p.43)<sup>6</sup>.

In spite of his father's decisive influence on his life, Kafka was much closer to his mother. Kafka worked through his conflict with his father in the (never delivered) letter published under the title *Dearest Father*:

compare the two of us: me, to put it very briefly, a Löwy with a certain Kafka core that is simply not driven by the Kafka will to live, prosper and conquer, but by a Löwy-like force that moves more secretly, more timidly, in a different direction, and which often breaks down completely. You, by contrast, a true Kafka in strength, health, appetite, loudness of voice, eloquence, self-satisfaction, worldly superiority, stamina, presence of mind, understanding of human nature, a certain generosity, of course with all the faults and weaknesses that go with these advantages, into which you are driven by your natural disposition and sometimes your hot temper (KAFKA, 2008, p. 20).

It was also his father who decided that, following his time at the *Volksschule*, Kafka should attend the *Staatsgymnasium* [public high school] in the old town in Prague, with lessons conducted in German. Kafka was an excellent pupil, although he never showed any real interest in the courses on ancient languages (BERGMANN, 1995, p.13). Following his Abitur in 1901, he devoted himself to the study of chemistry. After only a few weeks, however, he broke off his studies and began studying law. He never showed any real enthusiasm for the subject; on the contrary, as Max Brod writes, it was “with a sigh” (BROD, 1974, p. 43) that he took up the study of law. His choice of subject was essentially pragmatic. He described it as a natural course of events that he should have studied law:

this meant that I had no real freedom to choose my career, I knew that, compared with my main concern, I would again be as indifferent to everything as I was to the lessons taught at school, so I had as soon as possible to find a career that, without wounding my pride too much, would allow me to indulge this indifference. Law was the obvious choice. [...] And so I studied law, which meant that in the few months before the exams, even to such an extent that it damaged my nerves, my mind was positively living on sawdust, indeed on a sawdust that had already been chewed for me by thousands of other mouths (KAFKA, 2008, p. 67-68).

Alongside his law courses, Kafka attended lectures on Art History, as well as New High German and grammatical style<sup>7</sup>. Kafka was troubled not only by the bleakness of

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<sup>6</sup> “To improve his social prospects, a Jew in Austria needed to master the state language of the monarchy”. My trans.

<sup>7</sup> See the list of lectures visited by Kafka in Klaus Wagenbach (2006, p. 253).

jurisprudence, but also by a pronounced fear of exams. It is for this reason that he took a long holiday before his exams in 1905. His attempt to distract himself so as to be able to tackle his exams with vigour was a success<sup>8</sup>. Nonetheless, Kafka never took any pleasure in his studies. Shortly before his *rigorosum* in Roman, Canonical and German Law in June 1906, he bemoaned the superfluous cramming in a letter to Max Brod: “Since I do have to study now after all (don’t pity me; that’s wasting time on what is a waste of time) [...] I have to live like a nocturnal animal” (KAFKA, 1959, p.21). Kafka wrote his dissertation under the supervision of German economist Alfred Weber (1865-1958), the younger brother of Max Weber<sup>9</sup>. On 16<sup>th</sup> June 1906, he was awarded the title of Doctor of Law. With this, his years of subsisting on an intellectual diet of “sawdust” came to an end – years characterized by self-doubt, fear of exams and frustration with his studies.

Kafka’s choice of studies and occupation, but also his literary work, would have been very different without his father Hermann’s interference and impatience, as well as the demands and excessive pressure he put on his son: “my writing was about you” (KAFKA, 2008, p.63). Kafka would later write in *Dearest Father*, summing up his father’s central position in both his life and his literary work<sup>10</sup>.

### 3 THE UNWILLING LAWYER

Kafka went into legal practice in 1906. He took up the position (at least in name)<sup>11</sup> of trainee lawyer in the practice of his “uncle”, Dr Richard Löwy<sup>12</sup>. After attaining his doctorate, Kafka began the usual year-long internship in a local court in Prague, beginning in October 1906. In October 1907, immediately on completion of his legal education, he

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<sup>8</sup> Kafka passed both the “state judicial examination” (23.11.1905) and the “state examination in political science” (23.03.1906) with “satisfactory” results. At the time, the dissertation did not involve a written thesis, but rather consisted in a series of three oral examinations. Kafka mastered these exams, though there were dissenting voices on the examining board who found his performance wanting”.

<sup>9</sup> On Alfred Weber’s influence on Kafka, see Austin Harrington (2007, p. 41).

<sup>10</sup> According to the psychoanalytic theory of Pierre Legendre, the institution becomes the father (LEGENDRE, 1994).

<sup>11</sup> “I took up the position in the legal offices merely to pass the time, as agreed in advance with my employer. From the very beginning, I had no intention of remaining at the practice. I took up the post at the practice on 1<sup>st</sup> October 1906, and remained there until 1<sup>st</sup> October 1907” (KAFKA, 1999, p. 70, my trans.).

<sup>12</sup> The lawyer Dr Richard Löwy was in fact only a distant relative of Kafka’s. His biological uncle of the same name, the brother of his mother Julie Löwy, was a clothing and laundry supplies salesman. (WAGENBACH, 2006, p.498)

accepted a position at a private insurance company (*Assicurazioni Generali*).

However, Kafka only worked for the firm for a few months, ending in June 1908. Not only did the ten-hour days take their toll; in addition, his duties frustrated him tremendously. Shortly after taking up the post, he wrote to Hedwig W., with whom he had become acquainted during his holiday with his uncle Löwy in Triesch: “my present work is dreary” (KAFKA, 1959, p.35); and again at the beginning of 1908, he told Hedwig: “You know, I’ve had an abominable week, a terrible lot to do in the office. Perhaps that will always be so; I suppose one must earn one’s grave” (KAFKA, 1959, p.41). Some years later, in a letter to Felice Bauer from November 1912, he confessed to having had suicidal thoughts while working at Generali: “There was a certain place in a narrow passage leading to my office where almost every morning I used to be overcome with such despair that a stronger and more consistent character than mine might have committed suicide quite cheerfully” (KAFKA, 1978, p. 152). Kafka did not compose any literary works during his time at Generali. His ambition was to solve the problem of work pragmatically by choosing a job which would allow him freedom as a writer: “even as a small child I had abundantly clear presentiments about my studies and career. I expected no salvation from all this, I had long given up all hope of salvation” (KAFKA, 2008, p. 68). At Generali, this was clear to Kafka from the very beginning, his ambition to be a writer was pie in the sky. Therefore, he began looking for alternatives shortly after taking up the post.

A solution emerged in July 1908, when Kafka took up a position at the Workers’ Accident Insurance Institute in Prague. These institutions had been established in 1889 by Kaiser Franz Josef as part of a wave of new social legislation. Their task was to address issues surrounding accidents at work, to administer the payment of accident pensions, etc. The Prague division – the largest of the institutes – oversaw almost 300,000 factories, and had more than 250 employees in 1913. In this environment, Kafka proved to be both a reliable employee and a capable lawyer. He rose steadily through the ranks, and “his achievements in law set an example to others” (KAFKA, 1995, p. 87-88). Alongside his legal expertise, he quickly acquired a grasp of the technical matters necessary for his work in risk classification, and fulfilled his tasks reliably and meticulously, at least for the first few years.

Nonetheless, it was not until 1911 that Franz Kafka was really able to make space for



his literary work. The “triumph of his poetic ambitions over the professional” (HERMSDORF, 1984, p. 9) came relatively late. Kafka was not able to clearly separate the mutually subsisting spheres of work and writing. Instead, as he notes in his diaries, he took on “a horrible double life from which there is probably no escape but insanity” (KAFKA, 1972, p.38). Kafka’s day-to-day office life became the object of his literary texts, while his literary talent left its mark on the procedural documents, speeches, public advertisements etc. he composed at the office. Nonetheless, he was far from being able to bring his professional and literary ambitions into harmony with one another. In addition, his parents made agonizing demands of him. He found himself in “the pincers of the three-way constellation of work, parents, and writing” (WAGENBACH, 2006, p.151).

In the autumn of 1911, he was granted part ownership of the Prague asbestos factory – a deal struck by his parents on the occasion of his sister’s marriage. In the factory, Kafka had to take on the responsibilities of a business manager, alongside his job at the agency and his literary ambitions. He was completely overburdened, and thoughts of suicide returned. It was only on the initiative of Max Brod, who – without consulting Kafka – brought the situation to his mother’s attention, that the conflict could be addressed, and Kafka was *de facto* freed from his obligations at the factory<sup>13</sup>.

However, the subtraction of his responsibility for the factory from the tripartite strain of office work, writing and family was only a marginal improvement. The primary conflict between work and literature harboured plenty of tortuous potential all of its own. A withdrawal into the private sphere, such as he might have achieved by quitting his job, was out of the question for Kafka. For someone who felt his life and his responsibilities at the agency to be inseparable, such a solution was not psychologically viable<sup>14</sup>. The office

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<sup>13</sup> In the end, the factory proved to have been a bad investment – in 1917, it was removed from the commercial register.

<sup>14</sup> Cf. Kafka’s letter to Milena from July 1920, in which he refuses her suggestion that he should lie to his employer so as to be able to spend a few days with her in Vienna: “Consider, Milena, that the office is not just some arbitrary, stupid institution (although it is and very much so, but that’s not the point; as a matter of fact it’s more fantastic than stupid) but up to now it has been my life. Of course I can tear myself away from it, and that might not be a bad idea; nevertheless it has been my life up to now. I can shirk off and work less than anyone (I do); I can make a mess of things (I do), while still making myself important (I do); I can calmly accept the most special treatment imaginable as my due; but to lie just so I can suddenly leave – as a free man, since I’m just an employee after all – to go where ‘nothing else’ is sending me except the natural beating of my heart – I just can’t lie like that” (KAFKA, 1990, p.126).



meant hell, the “dregs of despair” (KAFKA, 1978, p. 601)<sup>15</sup>; but it also gave his life structure. In a draft letter to Felice Bauer’s father written in August 1913, he formulates this fateful dilemma as follows:

my job is unbearable to me because it conflicts with my only desire and my only calling, which is literature. Since I am nothing but literature and can and want to be nothing else, my job will never take possession of me, it may, however, shatter me completely, and this is by no means a remote possibility. Nervous states of the worst sort control me without pause, and this year of worry and torment about my and your daughter’s future has revealed to the full my inability to resist. You might ask why I do not give up this job and – I have no money – do not try to support myself by literary work. To this I can make only the miserable reply that I don’t have the strength for it, and that, as far as I can see, I shall instead be destroyed by this job, and destroyed quickly (KAFKA, 1972, p.230).

Indeed, Franz Kafka never resigned from his position in the workers’ accident insurance, nor was he ever dismissed; on the contrary, Kafka enjoyed a great deal of protection. Shortly before his retirement, when signs of his illness were already visible, he was given a promotion, with the specific aim of increasing his pension entitlement (STACH, 2013, p. 452). Kafka’s superiors were patiently tolerant of his various escapades: spontaneous holidays, lateness, phases of unproductivity, writing private correspondence in the office, etc. Indeed, Kafka’s employers even intervened to prevent his conscription for military service in the First World War, claiming he was indispensable to them – even as Kafka himself had actively and euphorically pursued military service for a brief period, thinking to have found in it his salvation (STACH, 2013, p. 61).

Even though Kafka did not serve in the armed forces, he was nonetheless confronted on a daily basis with the consequences of the outbreak of the First World War in 1914. Prague’s borders were closed in the face of growing numbers of refugees, and food was rationed. Kafka’s institute increasingly became involved in questions of martial law and claims made by victims of war. Antisemitism and nationalism became more pronounced, and the war shaped daily life<sup>16</sup>. Kafka’s apparently blithe often-cited diary entry from August of 1914 (“Germany has declared war on Russia – Swimming in the afternoon”)

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<sup>15</sup> See also the letter from 7.4.13, in which he writes: “real hell is there in the office; I no longer fear any other” (KAFKA, 1978, p.354).

<sup>16</sup> “To which I responded [...] that abnormal behaviour was not the worst thing because normality was, for instance, the world war” (KAFKA, 1982, p.70).

(KAFKA, 1972, p.301) is misleading: both before and after the capitulation of Austria-Hungary, his life was heavily shaped by the realities of the war and of post-war daily life. Indeed, the war left its traces on Kafka's body. Following a blood clot in his lung on 13<sup>th</sup> August 1917, the availability of the necessary medication was limited due to the war; treatments in Sanatoriums fell through due to problems with travel documents, etc.

In the aftermath of this illness, Kafka's health only ever stabilised for short periods. From 1917 until his eventual retirement in July 1922, he worked only 18 months at the office, with constant interruptions for cure and recovery visits, each of which lasted several months. Even after his retirement, while living with Dora Diamant in Berlin in 1923/24<sup>17</sup>, Kafka was confronted with hyperinflation, another consequence of the war. It was during the war and its aftermath that Kafka came to recognise the dense interrelation of the powers that be. He realized that big questions are always intertwined with apparently trivial matters, and that catastrophe and banal everyday routine run in parallel<sup>18</sup>. It is of great significance for his literary work that

Kafka bore witness to the devastation of the fully depersonalized, mechanized violence which erupted in August 1914, and which would later come to be understood as the primal catastrophe of the century. Already during his lifetime, the deadly alliance of violence and bureaucracy had claimed victims. There could have been no world war without typewriters, files, index cards and rubber stamps; Kafka understood this better than any of his fellow writers (STACH, 2013, p. 573).

Kafka died on 3<sup>rd</sup> June 1924 in the Sanatorium of Dr. Hoffmann in Kierling, near Vienna. The devastation he had witnessed shaped both his life and his literary work. He was spared the developments which were already stirring in 1924 – Hitler was released from prison in Landsberg six months after Kafka's death. Kafka's three sisters died in the Nazi gas chambers – Ottla in Auschwitz, Elli and Valli in Chelmno. Countless people, to whom Kafka had been close, including Milena<sup>19</sup>, would not survive the German Terror and the genocide of the Jews in the Second World War (STACH, 2013, p. 573).

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<sup>17</sup> Kafka left Berlin in March of 1924 for a visit to a sanatorium, from which he would never return.

<sup>18</sup> On the reflection of the war in the works composed by Kafka at this time, see the various essays in Manfred Engel/Ritchie Robertson (Eds.), *Kafka. Prag und der Erste Weltkrieg*. Würzburg: 2012.

<sup>19</sup> Melina's (2015, p.16) devastating letters written following her arrest by the Gestapo and her internment.

## 4 FROM BATTLE CHARGER TO BOOKWORM AND BACK AGAIN

It is partly thanks to luck and partly to the devoted efforts of his friend Max Brod that Kafka's works survived the catastrophes of the 20<sup>th</sup> Century. Not only did Brod act against Kafka's explicit instructions in his will to destroy all of his unpublished works, diary entries etc.<sup>20</sup>; he also brought his handwritten manuscripts to safety in Palestine shortly before German troops entered Prague. The small proportion of Kafka's works that had been published at this stage had long since been banned by the Nazis, with many copies being destroyed at book burnings. Brod's success in preserving Kafka's texts means that today, the scope for an engagement with Kafka goes far beyond the works published in his lifetime (BECKER, 2010) spanning the novel fragments – *America*, *The Castle* and *The Trial* – and also his diaries, notebooks and letters. As such, a contemporary study of Kafka's "legal literature" has many potential sources to work with, all of which give us insight into Kafka's understanding of law. How is Kafka's conception of law made manifest in these writings?

### 4.1 The *Office Writings*

A brief glance at the *Office Writings*, Kafka's contributions to the world of legal discourse, is enough to see that Kafka was engaged in legal argumentation – or, in the vocabulary of his *The New Advocate* (KAFKA, 1971, p.453-454), that he played the role of a legal "battle charger". These texts mostly comprise an analysis of issues arising in the context of his work at the agency from an insurance law perspective, such as the clarification of the events surrounding accidents, or the risk classification of different businesses (KAFKA, 2009). Kafka's legal texts stand out for their dogmatic exactitude and linguistic precision. Some of his texts develop very specific policy proposals regarding accident prevention, or criticisms of the way law is practised. In such texts, he attacked "social and legal injustices in his professional field openly, precisely, and resolutely"

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<sup>20</sup> "Of everything that I have ever written, only the following books are of any worth: the *Judgement*, the *Stoker*, *Metamorphosis*, *In the Penal Colony*, *A Country Doctor*, and the short story *Hunger Artist*. (The few copies of *Meditation* can remain untouched, I don't want to put anyone to the trouble of pulping them, but none of its content is to be reprinted). [...] – on the other hand, with no exceptions, everything else I have written (pieces printed in newspapers, manuscripts and letters) should, insofar as it is possible and can be obtained by asking the addressees [...] – all of this should without exception remain unread [...] all of it without exception is to be burned, and I ask you to take care of this as soon as possible." (KAFKA, 1989, p. 421. My trans).

(HÖCHERL, 1995, p. 829).

His criticisms target in equal measure the legislative (e.g. *Inclusion of Private Automobile "Firms" in the Compulsory Insurance Program*) (KAFKA, 2009, p.80-86) the executive (*Workmen's Insurance and Employers*) (KAFKA, 2009, p. 145-163), and the judiciary (*The Scope of Compulsory Insurance for the Building Trades*) (KAFKA, 2009, p. 54-69).

In those cases in which Kafka clearly aligned himself, it was always in defence of the interests of employees: he writes, for example, that the jurisdiction of the courts is "deficient" insofar as "the new interpretation, which restricts the obligation for insurance, [can] be reconciled neither with the spirit nor the letter of the law in a satisfactory manner" (KAFKA, 2009, p. 54-60). This leaves employees without any protection, discrediting insurance as such: "And if the workers – all of them as laymen, though the most concerned laymen – think about the issue, they can only conclude that it is chance rather than principle that governs insurance" (KAFKA, 2009, p. 54-60).

Like almost every aspect of Kafka's work, his sympathy for the working classes had a biographical basis. Kafka had always been "interested in the social question" (WAGENBACH, 2006, p. 62). He was conscious of the fact that "the luxury of the rich is paid for by the misery of the poor" (JANOUGH, 1971, p.131). As a young man, he had already witnessed the conflicts between his father and his employees in the clothing trade. Even at this early stage, Kafka writes in *Dearest Father*, "I could not help but ally myself with the staff" (KAFKA, 2008, p.45). Kafka found bureaucratization and mechanization "ghostly," (KAFKA, 1978, p.352) alienating and dehumanizing (HÖCHERL, 1995, p. 829). The asbestos factory which he briefly ran also gave him a sense of the objectification of the world. The workers, Kafka writes, were not treated like human beings, "you don't greet them, you don't apologize when you bump into them, [...] they are at the mercy of the pettiest power and haven't enough calm understanding to recognize this power and placate it by a glance, a bow" (KAFKA, 1972).

In Kafka's view, it is not politics as such which is responsible for this state of affairs. Kafka never held much hope for politics. He found the Czech anarchists, whose meetings he attended (WAGENBACH, 2006, p. 162), to be somewhat naïve. Nonetheless, his

sympathies were clear. He met the rampant nationalism of the era with a “malignant look” (KAFKA, 1972), and as a school pupil, he remained seated out of protest during the singing of national songs<sup>21</sup>. Kafka’s anger was not so much directed at the government as the unscrupulous employers<sup>22</sup>. As he saw it, the hegemony of the rich resulted primarily from the fact that “the voice of the workers was entirely absent” (KAFKA, 2009, p. 54-68) in many areas of regulation. He considered their lack of organization, together with their isolation, to be the crux of the problem. There was too little dissent, and too much polite compliance: “How meek these people are, they come to us with requests. Instead of storming the Institute and smashing everything to bits, they come and make requests” (BROD, 1974, p. 102). Kafka, who as a 16-year-old school student had turned to socialism, wearing a red carnation in his buttonhole (WAGENBACH, 2006, p. 61), envisaged more humane working relations. In his programme for the “Workers Without Property” (March 1918), in which he sketches the duties and rights of the workers, he formulates the fundamental right of workers as follows: “Working life is a matter of conscience, and of faith in one’s fellow man” (KAFKA, Fn. 12, p. 105-106. My trans.).

On questions of legal policy, Kafka was particularly critical of the maximalization of rationality characteristic of economic interest groups. It was a result of lobbying that the measures of the Institute met “not with the thoughtful decision of each individual employer dealing with the particular situation of his firm, but with retorts from organizations and trade associations”. As a result, the question of legal policies addressing the configuration of insurance relations

frequently and understandably fell into the hands of those who had no personal connection to the subject, did not have the necessary understanding of it, could not grasp the technical aspects, and thus, given the number of conflicting interests that they have to represent, choose the solution that was theoretically the most immediately comfortable and that thus appeared to be the most plausible. (KAFKA, 2009, p. 54; 65)

In particular, the lack of creative “courage” was a thorn in Kafka’s side, since it resulted in an all-too-willing submission to economic lobbying, as well as legislation which

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<sup>21</sup> “All of our classmates rose to their feet; Franz Kafka and I remained seated” (BECKMANN, 1995, p. 13-17).

<sup>22</sup> “He seems to have been sympathetic to injured workmen and inclined to blame employers for indifference to safety rather than workers for carelessness” (POSNER, 2010, p. 207-211).

often failed to address the matter itself. Instead, decision making “was regularly controlled by the strength of the influence exerted by the central office in question” (KAFKA, 2009, p. 145-147).

#### 4.2 The old Battle Charger Dr. Bucephalus

In his office writings, lectures and scholarly works, Kafka entered into disputes concerning the question of law. He made use of the technical apparatus of legal discourse, and intervened with concrete suggestions. Nonetheless, Kafka was ultimately an unwilling lawyer. He was a master of the legal trade, yet he did not trust it. Kafka’s claim in Dearest Father that he expected “no salvation” (KAFKA, 2008, p.68) from the law concerned his own personal fate, but can also be understood as a general rule: Kafka expected nothing of established legal practice other than the ever greater alienation of man from man. As such, it is no coincidence that one of the core commitments outlined in his programme for a commune of workers without property demands: “never request the arbitration of the courts” (KAFKA, (Fn. 12), p. 105-106. My trans.). Legal practice was contrary to Kafka’s own nature. He took no interest in litigation understood as a dispute concerning the law pursued by legal means. This is expressed succinctly in his short story The New Advocate. Dr. Bucephalus, the advocate, named after Alexander’s battle charger, has ceased all disputation and devotes himself solely to his studies. Kafka describes his transformation from battle charger to bookworm vividly (STERZENBACH, 1997, p. 1124), emphasising that

modern society being what it is, Bucephalus is in a difficult position. [...] Nowadays – it cannot be denied – there is no Alexander the Great. [...] Even in his day the gates of India were beyond reach, yet the King’s sword pointed the way to them. Today the gates have receded to remoter and loftier places; no one points the way [...]. So perhaps it is really best to do as Bucephalus has done and absorb oneself in law books. In the quiet lamplight, his flanks unhampered by the thighs of a rider, free and far from the clamor of battle, he reads and turns the pages of our ancient tomes. (KAFKA, 1971, p. 453-454; ALT, 2005, p. 513)

In the chaotic world, there is no ruler to lead the way. Politics no longer stands at the centre of society, but is merely one system among many. Likewise, legal battles fought in courts are no longer of any help. The only hope lies far from the noise of the legal battlefields in the reading of law. This is Kafka’s path. As a result and consequence of his

legal practice, Kafka developed a literary law which functioned as a critique of the law. This took him along convoluted paths, on which technical insurance problems repeatedly intersect with his literary works.<sup>23</sup> It would be wrong to reduce Kafka's detailed descriptions of administrative structures and bureaucracy to a lamentation of the concrete historical situation in the Austro-Hungarian Empire (KROLOP, 2012, p. 153; HEBELL, 1981, p. 52)<sup>24</sup>. And it would equally be wrong to separate, as Richard Posner does (POSNER, above fn. **Erro! Indicador não definido.**, p. 215), Kafka's official writings artificially from his literary writings. Kafka did not practice law as Dr. Jekyll and criticize it as Mr. Hyde. Kafka's practice and critique of law are intertwined. Kafka's literary critique of law is the consequence of his practical experience and of the frustration that goes along with the limitations, alienations and violences of legal practice itself.

In responding to these observations Kafka offers more than a critique of contemporary manifestations of law: his intervention knows no such limit. He criticizes the way in which diffuse legal forms are put into practice. However, like Max Weber's, Kafka's literary approach was itself not legalistic. Instead, he criticizes law from a non-legal perspective, albeit with one important difference from Weber:

Weber (as a sociologist) had a greater appreciation for the efficiencies, subtleties, and historical antecedents of modern law, whereas Kafka (as a writer) had a stronger sense of the absurdities and gallows humor of those who felt powerless in the face of modern legal systems (LITOWITZ, 2011, p. 48).

Kafka's literary law develops a refined sensitivity to impotence, helplessness, humanity, but also irony and hope. The dry sociological analyses of thinkers such as Max Weber do not register such things; by contrast, Kafka's literature makes palpable the suffering which accompanies alienation.

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<sup>23</sup> Accidents also have their place in Kafka's works; see Benno Wagner, „Kafkas Poetik des Unfalls“, in: Christian Kassung (Hg.), *Die Unordnung der Dinge*, Bielefeld 2009, S. 421 ff.; on the historical-discursive significance of Kafka's office writings, see Malte Kleinwort/Joseph Vogl, „Einleitung“, in: Malte Kleinwort/Joseph Vogl (eds.), *'Schloss'-Topographien. Lektüren zu Kafkas Romanfragment*, Bielefeld 2013, p. 11 ff. (14).

<sup>24</sup> Such a tendency can be observed in Kaspar Krolop, „Das Bild des Juristen im Werk von Kafka. Historische Selbsterfahrung oder zeitlose Charakterisierung“, in: Peter Becher et al. (eds.), *Kafka und Prag*, Köln 2012, p. 153 ff.; see also Claus Hebell, *Rechtstheoretische und geistesgeschichtliche Voraussetzungen für das Werk Franz Kafkas*, München 1981, p. 52: Kafka's characters articulate an 'historically objective unease.'



### 4.3 Ironies in the Historical Reception of Kafka

It is one of the ironies of the history of the reception of Kafka's works that it is precisely this non-legal punch line which the legal establishment has embraced. The legal battle chargers engage Kafka at precisely the point where he suggests an alternative form of legal work for Dr. Bucephalus: contemplation, self-criticism and empathy. It is not only jurisprudence which so proudly exploits Kafka's name, zealously claiming him as their own as part of the genre of "law and literature". Kafka is also used in legal disputation. Kafka has had his most lasting impact on legal practice precisely where he makes use of non-legal forms of argument: "Kafkaesque" has become a doctrinal figure in law, a juridical argument against exclusion and helplessness. In the event that things take a turn toward the Kafkaesque, the law must leap to the defence of the victim. This legalistic use of the term kafkaesque is most pronounced, of all places, in courtroom decisions.<sup>25</sup> No area of law has been able to resist this tendency: labor law (KRAUS, 1999, p. 309), family law (WEISBROD, 1993, p. 689), international criminal law (MORGAN, 2007, p. 73; DRAGICH, 1998, p. 853; BURNS, 2014), migration law (AKRAM, 1999, p. 309), European law (MORAWA, 2011, p. 159).

Kafka, the denier of the principle of denial of justice, had an impact on law more effective than that of any other combative jurist. Kafka did not merely produce an alternative point of view which might help to circumvent the hegemony of prevailing opinion at the level of argument. Rather, Kafka *became* legal doctrine. (WESEL, 1981, p. 14) The impact of his literature can be felt in positions adopted by the attorney general at the ERC, the Federal Constitutional Court of Germany, the German Federal Labour Court, and the German High Courts. The examples are myriad:

- The Advocate General of the ERC warned that European legislation on insolvency procedures has "Kafkaesque overtones" – "closely resembling the transformation of Gregor Samsa"<sup>26</sup>.
- Similarly, in a chamber decision from December 2012, the

<sup>25</sup> names 'Kafka's Greatest Hits' in jurisprudence: 'Kafkaesk judicial nightmare', '[R]esembles More a Scene from Kafka' and 'Kafkaesque Academic Test' (POTTER, 2005, p. 195).

<sup>26</sup> Opinion of ECJ Advocate General Dámaso Ruiz-Jarabo Colomer, 6.9.2005, ERC, C-1/04 ('Staubitz-Schreiber'), Rn. 6.

Constitutional Court of Germany asked “whether the capacity of the authorities to intervene in the scope of legal protection against its own measures does not amount to a structural transgression of what is acceptable in a constitutional state – ultimately straying into kafkaesque territory”<sup>27</sup>. Five years prior, the Constitutional Court had found that the feelings of those affected must be taken into consideration when working through a case: “If even one of the various interpretations which have come into consideration gives rise to the possibility of a case in which the effected individual finds him/herself in a situation which can only be described as Kafkaesque, in which he/she is subject to different decisions in various courts, a situation which can only be overcome through further drawn out court processes, this must also be taken into consideration in the interpretation [...]. This is particularly important for legal protection in areas such as sentencing, in which the effected individuals often lack the level of education, material resources and capacity for communication necessary for dealing with the complexities of legal decision making”<sup>28</sup>.

- In a decision of 15<sup>th</sup> June 1993, the Constitutional Court of Berlin found it to be “Kafkaesque” that “an artist in the former GDR was punished more severely than normal on the basis of sentencing practices contrary to the principles of a democratic nation, namely, because he had created artworks critical of the present regime. Furthermore, following the commencement of legal proceedings for a cassation to put right the injustice he had suffered, he was forbidden from viewing his own artworks on the basis of legal proceeding regulations which were clearly not intended for cases such as his own”<sup>29</sup>.

- And finally, the Higher Regional Court in Celle considers parents involved in a family trial to be unduly burdened “if they have grounds to fear that custody of their children may be partially revoked on the basis of a preliminary

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<sup>27</sup> Federal Constitutional Court of Germany, chamber’s decision of 19<sup>th</sup> December 2012 – 2 BvR 166/11, NSTZ-RR 2013, p. 120 ff. (Rn. 24).

<sup>28</sup> Federal Constitutional Court of Germany, chamber’s decision of 22<sup>nd</sup> March 2007 – 2 BvR 1983/05, BVerfGK 10, 509/516.

<sup>29</sup> Constitutional Court of Berlin, decision from 15<sup>th</sup> June 1993 – 18/92, JR 1993, p. 519 ff. (Rn. 50).

ruling in a “Kafkaesque” trial, without all avenues of enquiry having been pursued, and without being given any sense of how long it may take to reach a final decision which would take into account all of the relevant information”<sup>30</sup>.

“Kafkaesque” has become a fixed topos in legal praxis. Legal theory, too, has found in Kafka a source of inspiration. While the reception of Kafka in US-American Legal literature was initially limited to the exposure of the bigotry of a consensus-based calculus of maximizing well-being (as in the argument developed by Robin West against Richard Posner), (WEST, 1985, p. 384; POSNER, 1985, p. 1431) contemporary legal theory has begun to engage Kafka’s literary critique of law in a multifaceted manner (DRAGO, 2007, p. 496; ZIOLKOWSKI, 1996, p.325; FERK, 2006, p. 75; HEIDSIECK, 1994, p. 105; PINAIRE, 2007-8, p. 113; HOUTUM, 2010, p. 285; TENCKHOFF, 2000, p. 1143; ABRAHAM, 1985, p. 67; HIEBEL, 1983, p. 115).

## 5 DISPUTING LEGAL DISPUTATION

Nonetheless, Franz Kafka’s radicality as a writer remains underappreciated in the legal reception of his work (KILGER, 2010, p. 33). Such interpretations go to painful lengths in their efforts to treat Kafka as one of their own. In doing so, they render him a harmless poet-lawyer, reducing him to the role of an insurance lawyer, and distorting his fundamental critique of law, making of it a kind of legal wellness therapy. Literary theory, too, is often guilty of instrumentalizing Kafka, in its typically arbitrary manner. Abandoned to the fashions of literary theory, as Theodor W. Adorno recognized, his work is “reduced to an advice bureau for mankind’s contemporary situation” (ADORNO, 1981, p.245). Owing to the insular nature of literary studies, little place remains for an account of Kafka’s critique of law (JAHRAUS; NEUHAUS, 2002).

Kafka’s radicality lies in the complex manner in which he links law and literature, with the result that he is able to assess the law not from within jurisprudence, but rather from without, according to the medium of literature, which he uses to confront law with its

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<sup>30</sup> Higher Regional Court of Celle, decision from 1<sup>st</sup> September 2006 – 19 WF 285/06, Rn. 7.

own reflection (LITOWITZ, 2002, p. 103). Kafka opened a dispute with legal disputation on terrain foreign to the technocratic, pithy language of law: namely, the terrain of literature.

Franz Kafka's obsessive literary engagement with the legal system was ultimately a product of socialization. It was his pragmatic and grudging decision to earn his living by practicing law which first granted him the perspective so distinctive of his literary work, defined by its simultaneous distance from and proximity to the law. Only a reluctant legal practitioner could construct such detailed, biting and apposite analyses of legal praxis; only someone who has crawled through the dust of bureaucracy can describe its smell (SIMMEL, 1998, p. 135). Franz Kafka does this, and much more: his legal critique is *pars pro toto*. If Albert Camus admired the vehemence of the "proceedings Kafka institutes against the whole universe" (CAMUS, 2000, p.87), then this much at least is clear: Kafka does not merely criticize the law, but rather puts society as a whole on trial. The "Kafkaesque" element of contemporary social organisation, whose most extreme forms even common sense finds wanting, lies in the fact that people experience social organization as fate: impenetrable worlds of discourse, autopoietic systems, human impotence in the face of functional supremacies. Kafka shows in great detail the way in which the contradictions and inhumanities of social organization in the bureaucratic world are succinctly expressed in law. They are poured into legal molds and preserved (MINKKINEN, 1994, p. 349). Kafka's critique of law analyzes in excruciating detail the way in which law contributes to processes of social alienation.

Kafka's critical analysis does not merely unmask. It also contains a seed of hope; it is, as Camus formulates it, a "tremendous cry of hope". (CAMUS, 2000, p.85) For Kafka, this cry of hope is bound up with a painful empathy for the suffering of the human creature. There are three distinct strands of Kafka's social critique which I take to be central: 1) *Kafka's analysis* describes the process of spectral differentiation, bureaucratization and mechanization by unveiling the autonomy of social communication and its dehumanizing tendencies. *The hope*: the human gesture, the feeling of solidarity – mankind's power to resist alienation. 2) *Kafka's analysis* dissects the autonomy of the diverse forms of law, and exposes the staggering lawlessness of law to which ostensibly constitutional states give rise. *The hope*: a new form of socialization and a different kind of law which overcomes the

sovereign system of delusion. 3) *Kafka's analysis* criticizes the liberal legal paradigm and the fundamental sin of self-righteousness. *The hope*: not a turn away from law, a nihilistic overcoming of law, but rather a different kind of law, a law which renounces violence, an ascetic law, ultimately resulting in the transcendence of law.

### 5.1 Ghosts: the *Autopoesis* of Communcation

Kafka adopts the perspective of those who have fallen under the wheels of the system. His world is made up of people confronted by systematically impenetrable hindrances. His stories describe the ghostly autonomy of the modern age. Kafka addresses the very theme which Karl Marx had dealt with in economic terms, which Max Weber had developed further in various social spheres in relation to the polytheism of values, and which Niklas Luhmann had radicalised in terms of systems theory: (MARX, 1996, p. 81; WEBER, 2004, p.23; LUHMANN, 1971, p. 1) namely, the differentiation of social spheres. "The system", Luhmann reveals, "is a castle much like Kafka's" (LUHMANN, 1987, p. 202-204). But in contrast to sociological analyses, Kafka's interest lies not in the functioning of the systems, but rather in their effects. What do they do to people – to those who make decisions, and to those affected by these decisions? Such decisions shape the fate of these people. Law is only one of many systems which formulates demands and expectations. The family, economics, politics, religion – human beings are bound by functional expectations at every turn. Maurice Blanchot's description of the writer as the crystalization point of diverse social lines is, in fact, all too human:

the difficulty is that the writer is not merely several people in one, but that each of these individual moments denies all others, each claiming the whole for itself alone, tolerating neither reconciliation nor compromise. The writer is simultaneously answerable to several absolute and absolutely different commandments; his morality is founded on the convergence and opposition of relentlessly hostile rules (BLANCHOT, 1981, p. 24. My trans.).

These irreconcilable ensembles of expectation arise in social communication networks, in the process of the establishment of independence in a polycentric society without peak or center. Kafka's works contain touching descriptions of the effect this has on human beings, and of the ruination of the soul polycentricity introduces into the world.

In a letter of 1922 to Milena, he writes:

the easy possibility of writing letters – from a purely theoretical point of view – must have brought wrack and ruin to the souls of the world. Writing letters is actually an intercourse with ghosts and by no means just with the ghost of the addressee but also with one's own ghost, which secretly evolves inside the letter one is writing or even in a whole series of letters, where one letter corroborates another and can refer to it as witness. How did people ever get the idea they could communicate with one another by letter! (KAFKA, 1990, p. 223).

The ghosts of communication Kafka has in mind here do not merely make letter-writing more difficult; rather, they are immanent to all forms of communication and their dual contingencies. Communication between people is indirect, bureaucratic, technocratic, machinic (WOLF KITTLER, 1990, p. 75). The new global databanks, Google, Facebook, Twitter, NSA etc. have not supplanted Kafka's world (FISCHER-LESCANO, 2016), but rather have rendered its dangers exponentially greater, establishing an unbroken observation network (VOGL, 2010, p. 81). "Mielke certainly didn't know Kafka, but Kafka knew Mielke" – this is how Heiner Müller once described Kafka's anticipation of state security services, (MÜLLER, 1991, p. 49) institutions which arose from the ideology of a state which "[transforms] lives into procedures, human beings into files/dossiers, reality into paper, as Kafka described"<sup>31</sup>.

Kafka describes a world in which devices, machinery, and communication systems have taken over control<sup>32</sup>. The various monitoring points of global society are diffuse, yet connected with one another, coupled, or, as Gilles Deleuze and Felix Guattari put it, "interlinked":

Kafka [...] knew that technical machines were only the indexes of a more complex assemblage that brings into coexistence engineers and parts, materials and machined personnel, executioners and victims, the powerful and the powerless, in a single, collective ensemble. [...] In this sense, there is certainly a bureaucratic eros that is a segment of power and a position of desire. And a capitalist eros. And a fascist eros. All the segments communicate with each other through variable contiguities (DELEUZE; GUATTARI, 1986, p. 57).

These interlinked points of the matrix have long since assimilated even the most

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<sup>31</sup> Heiner Müller wrote these words in a posthumously published draft from January 1993, which was a reaction to accusations made concerning his contact with state security services (MÜLLER, 2005, p. 60).

<sup>32</sup> "Human beings are the enemy of the machine, the glitch in every well-ordered system. They are disordered, malfunctioning beings who spread filth" (MÜLLER, 1991, p. 39).

critically minded. They are used to embellish the pages of glossy magazines – Che Guevara has become an advertising icon, the Dacia Logan was promoted using quotes from Karl Marx, and, on the occasion of Kafka’s 130<sup>th</sup> birthday on 3<sup>rd</sup> July 2013, the search engine Google displayed a doodle of Gregor Samsa opening a door:



The systems adorn themselves with the images of their critics, leaving us with the crucial task of not allowing ourselves to be lulled by such assiduousness and pseudo-humanity, which ridicules these critics and their concerns. In this pseudo-humanity, which was so incisively described in Derrida’s hauntology, human beings are transformed into commodities. Derrida had in mind Karl Marx’s analysis of commodity fetishism when he described this process as ghostly: “These ghosts that are commodities transform human producers into ghosts” (DERRIDA, 1994, p. 195). The fully rationalized world gives itself a human face, where in fact,

never have violence, inequality, exclusion, famine, and thus economic oppression affected as many human beings in the history of the earth and humanity. The “New International” is not only that which is seeking a new international law through these crimes. It is a link of affinity, suffering, and hope (DERRIDA, 1994, p. 106).

It is time that we learn to feel disgust in the face of the ghosts of global utility maximizers, and to attune ourselves to their inhumanity. For Kafka, nothing is as definitive as suffering<sup>33</sup>. His insight into both suffering and the paradoxes and contradictions to which

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<sup>33</sup> In a conversation with Gustav Janouch, he is reported to have said: ‘But I am no critic, I cannot quickly transform myself into something different, then return to myself and precisely measure the distance. As I said – I am no critic. I am only a man under judgment and a spectator. [...] Indeed, I am also the usher of the court, yet I do not know the judge. Probably I am quite a humble assistant-usher. I have no definitive post. [...] The only definite thing is suffering’ (JANOUGH, 1971, p. 13).



it gives rise is razor-sharp.<sup>34</sup> The inhumanity of the social order is made palpable in his fiction, which holds up a mirror to its effects. Kafka creates this mirror image through a detailed, painfully realistic and expressive depiction of human emotion. Kafka makes the irrational palpable in the medium of communication. As early as his introductory address at a conference on Jewish Jargon in 1912, Kafka had already emphasized that communication concerns not only sense, but also sensibility, leaving his audience to contemplate “that you have within you, alongside knowledge, energies and intimations of energies which enable you to understand jargon on the basis of feeling alone” (KAFKA, 1993, p. 188-193, my trans.); on Kafka’s fascination with jargon (ROBERTSON, 1985, p. 14). It is this sensible understanding which occupies Kafka, he addresses these “human energies” (KAFKA, 1990, p.223). He repeatedly refers to the cooriginality of the rational and the arational. In the story *Josephine the Singer, or the Mouse Folk*, for example, he explains Josefine’s power of seduction as follows:

a kind of unexpended, ineradicable childishness pervades our people; in direct opposition to what is best for us, our infallible practical common sense, we often behave with the utmost foolishness, with exactly the same foolishness as children, senselessly, wastefully, grandiosely, irresponsibly, and all that often for the sake of some trivial amusement (KAFKA, 1971, p. 369).

Small diversions, foolishness and the extra-rational lie at the center of Kafka’s interests. For him, the human does not find its expression in the bourgeois pyramid of reason-based human dignity. For Kafka, what makes us human is not rationality, nor communication, but rather our animality and childishness. He develops his view of mankind from the bottom up. It is not words, but rather gestures which make the man (FROMM, 2013, p. 101). Kafka describes the relation of our feelings, energies and potencies to the structure of drive and affect that characterizes the political-juridical social order more vividly than anyone previously or since. In *The Knock at the Manor Gate*, to take only one of many possible examples, a childish game (the eponymous knock at the gate), an entirely trifling matter (“nowhere in the world would one be prosecuted for that”) results

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<sup>34</sup> “These are the paradoxes that must be enumerated, the contradictions that must be strengthened” (CAMUS, 2000, p. 88).

in an absurd trial in which even the judge is overcome by pity<sup>35</sup>. Childish play is haunted by a dark order, the game is followed by a juridical seriousness which nobody understands, and whose depiction clearly has only one goal: to outrage, to strip such insanity of its mask, to expose the ghostly system, in order to make room for childishness and humanity<sup>36</sup>.

The hope is that humanity can be teased out, that empathy and social (rather than individual) shame should arise in the face of the injustice of the existing order. This hope is not directed at the social matrix, but rather the people who are shaped by it and who fall victim to it. Humanness must overpower the logic of the system: "Logic is no doubt unshakable, but it can't withstand a person who wants to live" (KAFKA, 2009, p. 230). Kafka's hope has a human face.

## 5.2 Catastrophic Lawlessness

Kafka describes the effects that the autonomy of the existing order has on human beings in a variety of social settings. None of these, however, are so rich in detail as his account of the relation between law and man. For Kafka, the law which emanates from the logic of the state is in fact a perversion of the law. State law is a grandiose machine which serves to conceal a catastrophic lawlessness. Law is not law, but violence: "arrest", writes Adorno, "is assault, judgment violence" (ADORNO, 1981, p. 258). Kafka approaches the soulless social machinery (WEINBERG, 1963, p. 490) as an exorcist, attempting to drive out the demonic terror of the juridical-political order by depicting the suffering of those who have fallen beneath its wheels, and whose well-being has been forgotten by the ruling organizations. Kafka lays bare the feeling of powerlessness which accompanies this loss of freedom in order to drive out the demonic social order with daylight. It is to this end that he describes the terror spread by the systems of the bureaucratized world. For Kafka, it is in

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<sup>35</sup> "But when I stepped over the threshold of the inn, the judge, who had hastened in front and was already waiting for me, said: 'I am sorry for this man'" (KAFKA, 1991, p.71-2).

<sup>36</sup> See also Lyotard's elogy to childhood: 'Shorn of speech, incapable of standing upright, hesitating over the objects of its interest, not able to calculate its advantages, not sensitive to common reason, the child is eminently the human because its distress heralds and promises things possible. Its initial delay in humanity, which makes it the hostage of the adult community, is also what manifests to this community the lack of humanity it is suffering from, and which calls on it to become more human'. (LYOTARD, 1991, p. 3). With reference to Kafka's gatekeeper parable 'Before the law', Gerhard Kurz notes that it is only when the man from the country has grown old and 'childlike' that he recognises the radiant light of the law streaming forth from the door. By contrast, all of his previous attempts, making use of rationality ('considered', 'observed', etc.) to pass this barrier had failed (KURZ, 1980, p. 165).

gestures that the human is concealed: “from the very first house people emerged, making friendly but warning signs to us; these people were terrified, bowed down with terror” – this is how Kafka depicts the terror of the juridical order in *The Knock at the Manor Gate* (KAFKA, (Fn. **Erro! Indicador não definido.**), p. 361-362).

In *The Trial*, in which Kafka puts trials themselves on trial, he moves to convict law of inhumanity, as Adorno so aptly puts it: “The *Trial* novel is itself the trial of the trial. [...] In Kafka’s statement to whoever it may concern, he describes the court which sits in judgment over men in order to convict law itself” (ADORNO, 1981, p. 267). Again and again, and from ever new vantage points, Kafka depicts the lawlessness of the law (VISMANN, 2011, p. 35, my trans.), which is not the law of a free community of interpreters, but rather “the secret of the small elite which rules over us” (KAFKA, 1992, p. 270. My trans.). Even the “legal entourage” (VISMANN, 2011, p. 35, my trans.) is not safe from this injustice; the authorities and their subordinates are equally paralyzed by fear before the law: “One sees that this elite, too, is so lawless that they appear on the same level as the lowliest of men; creatures of every order swarm together without any dividing wall, exhibiting a secret solidarity with one another founded on the singular feeling of fear” (BENJAMIN, 1981, p. 39-44).

Kafka’s literature shows how human beings have been cast out, left at the mercy of the order. Kafka did not conceive of this order as centralized. Rather, he speculated that “free and untamed life” persists in precisely those places where political regulation has failed. This is conveyed in the story *The Great Wall of China*:

now the result of holding such views is a life that is in a certain sense free and unconstrained. By no means immoral; such moral purity as exists in my native region I have scarcely ever met with on my travels. But it is a life that is subject to no law of the present, and obeys only the instructions and warnings reaching down to us from ancient times (KAFKA, 1991, p.68-69, my emphasis).

For Kafka, the state law originating in Peking is further removed from law as it is lived in the Chinese countryside than the Vienna Decree from Eugen Ehrlich’s social right of the Bukowinians (BANAKAR, 2010, p. 463). Kafka believes that the centralized political regulation of society is unrealizable, since it is a matter of ruling over an incomprehensible labyrinth (BENJAMIN, 1968, p. 111). At the same time, he does not pin his hopes on politics. Kafka has little more than contempt for the political system and its logic of ruling

and following. In a letter to Franz Werfel, he writes: “You are surely one of the leaders of this generation, which is not meant as flattery and cannot serve as flattery of anyone, for many a man can lead this society, so lost in the morass” (WERFEL, 1959, p.366; trans. Modified).

As Heiner Müller writes in his essay on Kafka’s *In the Penal Colony*, Kafka did not merely envisage a new politics, but rather “the end of politics and the beginning of a new history of humanity” (MÜLLER, 1990, p. 30-31). It is here that the glimmer of hope, which Derrida also understands to be Kafka’s guiding idea, takes root. Kafka’s vision is a form of socialization which falls beyond political collectivity: “We are already caught up, each and every one of us, in a kind of asymmetrical and heteronomical curvature of the social space, more precisely, in the relation to the other prior to any organized *socius*, to any *politeia*, to any determined “government”, to any “law”. Prior to or before it, in the sense of Kafka’s *Before the Law*” (DERRIDA, 1993, p.365).

Kafka’s tragic protagonists are solitary figures<sup>37</sup>. This is the cause of their failure in *The Castle*, *The Trial* and many of Kafka’s other works. They have no connection with other people. The fact that “people lack a sense of context” (KAFKA, 1972, p.150), as Kafka notes critically, is a result of the isolating social order. It is imperative to rupture this order and to establish a new form of socialization, in which law, too, would take on a new form.

### 5.3 The Transvaluation of Values: Ascetic Law

Kafka does not rest content with the simple negation of state law. Instead, he offers a series of hints as to how he envisages the new form of law. As such, his demasking of the legal order as an order of violence is only one strand of a complex struggle, a fight not to destroy the law, but rather to establish a new law. Kafka’s central argument against the existing legal order targets the subjective self-righteousness which makes the order of violence possible. The impenetrability of myth is not a law of nature, but rather the product of the superstitions of individual reason. The latter is of no help in surviving in the spectral world. Oppression makes a nonhierarchical, intersubjective discourse between

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<sup>37</sup> This was also true of Kafka himself: ‘... here stood a solitary figure opposed to the course of the stars, opposed to the human race’ (BROD, 1983, p. 16-19). My trans.

reasoned beings unthinkable. Anyone who believes otherwise is a fool:

Kafka does not glorify the world through subordination; he resists it through nonviolence. Faced by the latter, power must acknowledge itself as that which it is, and it is on this fact alone that he counts. Myth is to succumb to its own reflected image. The heroes of *The Trial* and *The Castle* become guilty not through their guilt – they have none – but because they try to get justice on their side. [...] It is for this reason that their clever speeches, especially those of the land-surveyor, have something of the inane, doltish, naive about them – their sound reasoning strengthens the delusion against which it protests (ADORNO, 1981, p. 269).

Yet if this is so, how is liberation possible? Kafka does not see legal nihilism as a viable escape route. He does not accuse law as such, but rather urges respect for the law. His novel *The Trial* is, in spite of all its criticisms, a kind of “treatise in defence of the law” (PFAFF, 1987, p. 10). Kafka does not announce a false dichotomy between political realism and a kind of legal “art for art’s sake”<sup>38</sup>. Law must not capitulate to politics, nor should it constitute a kind of refuge for unrealistic legal superstitions without any social basis.<sup>39</sup> For Kafka, the only way out of this dilemma of self-defeat and self-satisfaction is the development of a new kind of law. This new law would bring with it a new form of socialization, which according to Kafka is necessary if we are to break with the violence of the existing order. It seems to me that there are three crucial steps for the realization of the new form of ascetic law envisaged by Kafka, which can only be effective when combined: 1) the overcoming of subjectivity, 2) the establishment of self-restraint, and 3) respect for different forms of law and for singularity.

1) *The overcoming of subjectivity*: Kafka’s obsession with law follows from his conviction that a particular form of law is responsible for triggering social isolation – namely, individualistic or subjective law, which leads to self-righteousness.<sup>40</sup> Examined more precisely, Kafka does not so much conduct a general trial against law, but rather a test case against subjective law. In 1920, he writes: “The original sin, the ancient injustice perpetrated by man, is the accusation he makes and from which he never desists, namely, that he has been done an injustice, that he is the victim of the original sin” (KAFKA, 1990,

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<sup>38</sup> On these false alternatives in relation to Kafka’s understanding of literature, see Barthes, 1972, p. 133.

<sup>39</sup> On these false alternatives, see Fischer-Lescano, 2014, p. 414.

<sup>40</sup> On the critique of subjective right, see Menke, 2015, p. 339.

p. 848-857). Kafka's diatribe targets the zealots of individual self-righteousness. In *Josephine the Singer, or the Mouse Folk*, he presents this in the form of a short story, describing Josephine's "fight for exemption from all daily work" (KAFKA, 1971, p.398. Trans. modified.). The singer, so admired by the public for the seductive quality of her song that she was "almost beyond the law", fights for freedom from daily work and from everything else related to our "general struggle for existence". But the public refuses her request. Thus begins Josefine's fight for her right, which becomes an all-encompassing struggle: "Her right", writes Kafka, "is beyond question; so what does it matter how she secures it; especially since in this world, as she sees it, honest methods are bound to fail. Perhaps that is why she has transferred the battle for her rights from the field of song to another which she cares little about". But this fails, and Josephine fails, since she is driven by arrogance, and her struggle is finally reduced to a mere episode: "Of her own accord she abandons her singing, of her own accord she destroys the power she has gained over people's hearts". The singer's failure is brought about by the excesses of her struggle for her rights. Much like Kleist's Kohlhaas, Josefine loses everything in an excessive struggle for her subjective rights (KAFKA, 1971, p.386-403. Trans. modified.).

(2) *The implementation of self-restraint*: Kafka is not solely concerned with the overcoming of law's individualism; mechanisms of self-restraint and self-assertion must also be established. This is not restricted to the need for people to rein in their engagement with the law and their self-righteousness; rather, self-restraint on the part of the law is also necessary. The law must limit and restrict itself if it is to be able to assert itself in the face of social adversity. The figure of Odysseus in Kafka's story *The Silence of the Sirens* is exemplary of this need (KAFKA, 1973, p.101-102). Homer's Odysseus ties himself to the mast of his ship and blocks his ears with wax so as to resist being seduced by the song of the sirens. In constitutional theory, Odysseus is considered a paradigm case of the interlinking of endogenous and exogenous techniques of self-commitment: through the constitution and the reflexive process of interlinking law with the relevant social systems, social systems bind – similar to Odysseus – themselves in chains in order to avoid the

temptations of maximizing their own rationality, which would ultimately be destructive.<sup>41</sup> Kafka alters this process. His Odysseus arms himself against the sirens' song. But this procedure ultimately reveals the hero's hubris, who headed off to his doom "in innocent pleasure over his little resources", mindful only of "his handful of wax and his bundle of chains". As Kafka puts it in *The Silence of the Sirens*, Odysseus did not recognize that the sirens exercise their power not through song, but rather through their silence. Odysseus chooses the wrong means to resist the danger – which, in the end, is how he defeats the sirens: "Odysseus [...] did not hear their silence". For Kafka, this is either a great coincidence or – and he considers this a genuine possibility ("although this passes human comprehension") – an act of cunning on the part of the hero. "Perhaps" Kafka emphasizes, Odysseus has "confronted them and the gods with the above mock episode merely as a kind of shield". For Kafka, it is not important whether it is a matter of superhuman cunning or of simple coincidence; what is important for him is the function fulfilled by self-restraint: the bondage functions because all parties believe in it and are made mindful of it.<sup>42</sup> Odysseus is "proof that even inadequate, indeed childish measures can suffice for one's preservation". Applied to the law: thorough jurists have never failed to note that the constitution is precisely such an Odyssean manoeuvre. Constitutions seek to guarantee their own permanence through immutability clauses, yet they are nonetheless defenseless against revolutions, coups d'état and other forms of overthrow (KELSEN, 1925, p. 254). Constitutions are tautological texts (DERRIDA, 1985) which are nonetheless of inestimable worth: they render the paradox of the foundation of law invisible, calling a halt to the process of reflexion, and providing a basis for the self-restraint and self-assertion of social systems in cooperation with "friendly gods" (LUHMANN, 1990, p. 176). The law has the same task as Odysseus in Kafka's *The Silence of the Sirens*: to tame itself in a pact with others, while simultaneously protecting itself from immediate environmental factors. Law

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<sup>41</sup> "Law and politics develop complex forms of an exogenous self-constraint that are – not coincidentally – reminiscent of freedom through self-constraint and of the artful conjunction between self-constraint and externally imposed constraint found in the myth of Odysseus" (TEUBNER, 2015, p. 8).

<sup>42</sup> "For myth is the knowledge that the sirens cannot be defeated solely through one's own strength, but rather only with the help of friendly gods. Only one who represses this fact could fail to hear in myth the voice of the other, instead finding only himself. He gets carried away, denying the authority which issues from law, and is left instead with the feeling of having triumphed through his own strength" (WOLF KITTler, 1985, p. 129).



cannot allow itself to be seduced by politics or economics. Robbed of autonomy in its decision making, it would be wrecked on the cliffs of its social environment. Law must arm itself against all such seduction, preserving its autonomy while also ensuring that it does not itself become a destructive force.

(3) *Respect for different forms of law and singularity*: Alongside his critique of subjective right and his plea for juridical self-restraint and self-assertion, Kafka takes a third, decisive step. He indicates the necessary difference between the form of law and singularity, and calls for respect for this difference. In his gatekeeper parable, his most fascinating legal fable (KAFKA, 1998, p.167-169), Kafka makes a case for leaving things in abeyance, allowing them to remain unclear. The desire for the law remains an open question: “one has to want to enter” (CIXOUS, 1991, p. 1-15; RAMSHAW, 2003, p. 11). The man from the country does not pass through the gate into the realm of the gatekeeper, nor does he question the basis of the latter’s decisions. The man from the country does not turn away; nor do the law or the gatekeeper. The man from the country and the law size each other up, showing respect for one another, and treating one another politely; they are “doubles, twins” (WOLF KITTLER, 2006, p. 647). The *subcomandante* of the order and the subject of the law do not fight with one another, but rather are bound together by a common destiny. In contrast to *Josephine*, in Kafka’s utopia for the man from the country and the law, there is no desperate struggle for admission to the law. Kafka does not seek the inclusion of the man from the country, nor the coincidence of the author and the subject of the law, as in Habermas’ thought or in the Mosaic doctrine of revelation<sup>43</sup>. Agamben thus in his left-Schmittian pattern of thinking and his obsession with the state of exception misunderstands the parable. He sees the messianic task of the man from the country as “that of making the virtual state of exception real, of compelling the doorkeeper to close the door of the Law (the door of Jerusalem)” (AGAMBEN, 1998, p. 56-57). In doing so, he fails to see that it is not a question of the attainment of individual right, nor of the dissolution of law. Rather, there is a third alternative: the restriction of the form of law,

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<sup>43</sup> Kafka’s gatekeeper parable is anti-Moses, as Wolf Kittler correctly observes (WOLF KITTLER, 1993, p. 173); on the parallels between the ‘man from the country’ and the Jewish ‘Amhorez’ (GRÖZINGER, 1994, p. 57; POLITZER, 1978, p. 278). More generally, on the connection between Kafka’s literature and the Jewish tradition (GRÖZINGER et al; 1987).

respect for singularity (FISCHER-LESCANO, 2013, p. 108), respect for life<sup>44</sup>, but without simply incorporating life into law, or giving up on law altogether (LOICK, 2016, forthcoming). The task is to develop the dialectic between system and man. In the nonidentity of man and society, the order cannot be rendered humane through the dissolution of this nonidentity. Things are more complicated than this, such that humanistic naivety would be out of place here. The inharmonic cannot simply be harmonized. The systems cannot be stripped of their differences. Rather, the solution must begin with this difference, developing a complex interrelation between system and human beings (MÖLLER, 2015, p. 186). This requires mutual respect. Law and human beings are not opposed parties in an agonistic struggle. Individuals must be careful not to lose all sense of measure in fighting for their own rights, as Josephine does; but equally – and this is the lesson of *The Silence of the Sirens* – the law must not allow itself to be misled by the sirens of social forces. Law and people, legal form and singularity are interdependent.

These three steps – the critique of subjective right, the establishment of the self-restraint of the law, and respect for the difference between the form of law and singularity – are all vital if we are to understand Kafka's utopia, which is founded on a non-violent, ascetic law, and ultimately the transcendence of law with a view to a new, different kind of law. This utopia is not simply a matter of making the law a little smarter, a little more conscious of its own violence. Such a "depotentializing" in the sense also suggested by Christoph Menke, in which "the enforcement of the law comes to be merely *one* possibility [among others], which may *or may not* be utilized" (MENKE, 2014, p. 136), is not what Kafka has in mind. The danger which Menke identifies, namely that a body of law "which has radicalized its level of self-reflection to the point of utopia [...], [can] no longer function as a radical party in the political struggle against social domination" (MENKE, 2014, p. 138), is a genuine danger only within the violent order. Within this order, law is "one side in a

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<sup>44</sup> It seems to me to not be a mere matter of procrastination (LISKA, 2012, p. 175-192), but rather a fundamental containment of the violence of law, achieved through a non-violent process of legal decision-making. With his call "to have done with judgement", Gilles Deleuze makes the opposite mistake, calling into question the entirety of the legal decision-making system, and ultimately aiming to overcome the violence of law through its complete destruction. This does not cohere with Kafka's idea of an ascetic law, even as Deleuze draws on Kafka's "In the Penal Colony" to correctly criticize the way in which the cruel force of the law results in the dominance of logic over life: "The system of cruelty expresses the finite relations of the existing body with the forces that affect it" (DELEUZE, 1998, p.128).

struggle”, within which it is a matter of making use of tried and tested forms of struggle – subjective application of the law,<sup>45</sup> strategic litigation etc. (strategies of which Kafka also makes use).

For Kafka, however, it is not merely a matter of a less violent configuration of the possible (though it is this, too). Rather, he sets his sights higher: it is a matter of the impossible. In utopia, the law, the hinge around which the constant back-and-forth between hegemony and counterhegemony, between social domination and the socially oppressed revolves, is transformed such as to overcome domination altogether, rendering society free. The patience of the gatekeeper and the man from the country; the critique of subjective right; the plea against judicial enforcement mechanisms; the twilight of the gods for judicial battle chargers – Kafka envisages a different kind of law, a non-violent force of law.

Admittedly, Kafka gives few clues as to how this paradoxical non-violent force is to be interpreted, but Walter Benjamin followed these clues, developing the idea further.<sup>46</sup> In particular, Benjamin proposed a diversification of the concept of violence. It is a matter of curbing existing violence, making way for a new, purely “divine” violence (BENJAMIN, 1999)<sup>47</sup>. This, too, remains obscure, giving rise to Derrida’s fundamental misunderstanding, according to which Benjamin’s violence-free utopia implies complicity with the violence of national socialism (DERRIDA, 1990, p. 919). Ultimately, however, Benjamin gestures toward a way of dealing with the violence of law which takes utopia seriously. Rather than accepting the “prevailing” violence of the law (however depotentiated it may be), or the destructive violence of legal nihilism (however liberating it may be), Benjamin has in mind a

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<sup>45</sup> Keeping in mind, however, Ludwig Raiser’s relativization of the “individual as the functionary of the legal order” (RAISER, 1963, p. 145).

<sup>46</sup> In Agamben’s account, the question of authorship is muddled, as he seems to take Benjamin rather than Kafka for the author of the story ‘The New Advocate’. In any case, Agamben points to a moment in Benjamin’s Kafka interpretation which he names *profanation*, namely, the desecration of ‘something that was once sacred or religious and is returned to the use and property of men’. Giorgio Agamben, *Profanations*, trans. Jeff Fort (2007, p.73). It is profanation which first makes possible ‘a new dimension of use, which children and philosophers give to humanity. It is the sort of use that Benjamin must have had in mind when he wrote of Kafka’s *The New Attorney* that the law that is no longer applied but only studied is the gate to justice. Just as the *religio* that is played with but no longer observed opens the gate to use, so the powers [*potenze*] of economics, law, and politics, deactivated in play, can become the gateways to a new happiness.’ (Ibid., p.76).

<sup>47</sup> See also the distinction between law and violence in Christoph Möllers (2015, p. 450-452).

new, pure force of law, in which “the longing for the other, beyond the violence of law” is revealed, as Cornelia Vismann writes (VISMANN, 1992, p. 250). Only a utopia of legal *vis*, legal *force*, can transcend the law<sup>48</sup>.

For this form of law, violent implementation is no longer possible. It would be a law which resisted the temptations of violence, and which restrained itself, realizing a transvaluation of values. Instead of the asceticism of man under the yoke of law, this transvaluation would be a matter of the asceticism of law itself: “Submission to law”, Nietzsche writes while addressing the question concerning the ascetic ideal, “oh, how the consciences of nobler clans rebelled everywhere against having to give up their vendettas and accept the violence of law over themselves! Law [...] emerged with violence, *as* a violence to which man submitted, ashamed of himself” (NIETZSCHE, 2007, p.82, trans. modified). It is necessary to overcome this violence, and to put an end to this shame.

“It seemed”, Kafka writes at the end of *the Trial*, “as though the shame was to outlive him” (KAFKA, 2009, p.231). For Kafka, it is a matter of recognizing and overcoming such shame, a shame whose origin he traces back to subjective rights and obligations, and their respective application in the form of a trial. With this gesture, Kafka (fn. 43, p. 339) exposes the shaming effect of the law, the disgrace which law constitutes for human beings and for society:

corresponding as it does to his “elemental purity of feeling”, shame is Kafka’s strongest gesture. It has a dual aspect, however. Shame is an intimate human reaction, but at the same time it has social pretensions. Shame is not only shame in the presence of others, but can also be shame one feels for them (BENJAMIN, 1968, p. 129-30).

While Kafka fights for liberation from the yoke of bad conscience and shame, he also appeals to a social feeling of shame. He attempts to unleash our sense of social suffering, and to bring disgrace to the order as an expression of empathy<sup>49</sup>. Kafka exposes shame as

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<sup>48</sup> See Adorno’s account of the transcendence of exchange (or barter) (ADORNO, 1973, p.147); see also Teubner (2009, p. 1).

<sup>49</sup> “Rights save neither men nor a philosophy that is reterritorialized on the democratic State. [...] A great deal of innocence or cunning is needed by a philosophy of communication that claims to restore the society of friends, or even of wise men, by forming a universal opinion as ‘consensus’ able to moralize nations, States, and the market. [...] Nor is it only in the extreme situations described by Primo Levi that we experience the shame of being human. We also experience it in insignificant conditions, before the meanness and vulgarity of existence that haunts democracies,

the product of law, of law as the source of error, guilt and sin<sup>50</sup>. He attempts to establish a violence-free law by putting false practices to shame through his literature<sup>51</sup>.

When Benjamin describes “the law which is studied and not practiced any longer” as “the gateway to justice” in his essay on Kafka, he indicates that possibility of law as violence-free non-law (FISCHER-LESCANO, 2015, p. 267), in which law is no longer enforceably practised (BENJAMIN, 1968, p.139). In a letter to Gershom Scholem, he adds that “Kafka’s messianic category is a matter of “inversion/reversal” or “study” ( BENJAMIN, 1981, p. 77-78; WEBER, 2006, p. 65-69; MÜLLER, 1996, p. 230). To understand this concept of “inversion”, it is necessary to grasp Kafka’s concept of “law” [*Gesetz*]<sup>52</sup>. As is clear in the gatekeeper parable, universal law functions in combination with justice as a relay between universal right and singularity. The law, which severs its ties with justice, is violence and domination. At the same time, the rule of justice is dependent on the law. It is only in this combination that the forces of law which bind totality with singularity are liberated, overcoming the obscenity of law (TEUBNER, 2016), and establishing a new form of law. It is through the law that the human society envisaged by Kafka can take shape.

It is here that Kafka’s political vision of the end of politics and of the beginning of the history of humanity intersects with his legal utopia. In *The Problem of Our Laws*, he writes “This view, so pessimistic where the present is concerned, only brightens up with the belief that one day a time will come when tradition and its study will reach full term, everything will have been made clear, the law will have become the property of the people, and the nobility will have disappeared” (KAFKA, 2015, p. 23). This era, in which the law will belong to society itself, is *a venir*. With its onset, the law will not cease to be, but

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before the propagation of these modes of existence and of thought-for-the-market, and before the values, ideals, and opinions of our time. The ignominy of the possibilities of life that we are offered appears from within. We do not feel ourselves outside of our time but continue to undergo shameful compromises with it. This feeling of shame is one of philosophy’s most powerful motifs. We are not responsible for the victims but responsible before them. And there is no way to escape the ignoble but to play the part of the animal (to growl, burrow, snigger, distort ourselves): thought itself is sometimes closer to an animal that dies than to a living, even democratic, human being” (DELEUZE; GUATTARI, 1994, p.107-8).

<sup>50</sup> Paul’s Epistle to the Romans: “for I had not known lust, except the law had said, Thou shalt not covet.” (Rom. 7: 7).

<sup>51</sup> On shaming as a form of resistance (JACQUET, 2015, p. 176).

<sup>52</sup> Benjamin misconceives this concept: “I take Kafka’s constant striving toward the law to be a blind spot in his work. Indeed, I have no desire to examine this concept”. (BENJAMIN, 1981, p.78; for a criticism of this standpoint, GASCHÉ, 2002, p. 971).

rather will be a new kind of law – a law that is not divisive, but rather socializing. It will not lead to isolation, but rather will make connections and happiness possible. In his story *Advocates*, Kafka expresses his wish to escape from the courts, and to find himself in a place “where all kinds of people meet, from various parts of the country, from every class, every profession, of all ages [...]. Perhaps the most suitable place for this would be a huge fairground” (KAFKA, 1991, p. 139). This new form of sociality, beyond all political machinations (FITZPATRICK, 2016, p. 30), this contented togetherness in a “community of free individuals” (MARX, 1996, p.89) is accompanied by a new law, which no longer propagates declarations of independence, but rather declarations of *dependence* (LOICK, 2013, p. 321).

## 6 THE WRITER AS TRUE JURISPRUDENT

While Kafka reveals the inhumanity of legal practice, he voices hope that the law could in fact be rendered humane, that it might be wrested from violence and oppression, that objectified law could be turned toward the human (GLEN, 2007, p. 2)<sup>53</sup>, and that it should be possible to raise the juridical “world into the realm of the pure, the true and the unchanging” (KAFKA, 1990, p. 837-838). This is not possible in frontal opposition to the law, but rather requires ironic distance, cunning and small displacements, which can only succeed through the slow and arduous “boring of hard boards”:

but the often noted irony of these traits is itself part of the didactic content. It was not humility that Kafka preached, but rather the most tried and tested mode of behaviour against myth – cunning. The only chance, in Kafka’s eyes, however feeble and minute, of preventing the world from being all-triumphant, was to concede it the victory from the beginning (ADORNO, 1981, p. 268)<sup>54</sup>.

For Kafka, it is cunning which can open the way to freedom, by means of which, through small profanations, the existing order is apparently confirmed, but in fact playfully transformed. In “the Silence of the Sirens”, this remains purely in the realm of possibility

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<sup>53</sup> For Adorno, it is a matter of a ‘mimetic law’; see Andreas Fischer-Lescano, ‘Soziologische Rechtsästhetik’, in: *Nach Feierabend. Zürcher Jahrbuch für Wissensgeschichte* 2015, p. 31 ff.

<sup>54</sup> Elias Canetti also offers a description of Kafka’s relationship with violence: ‘Since he abominated violence, but did not credit himself with the strength to combat it, he enlarged the distance between the stronger entity and himself by becoming smaller and smaller in relation to it.’ (CANETTI, 1974, p. 98).

for Kafka; by contrast, in his story *The Truth about Sancho Panza*, the freedom of cunning is put into effect:

Sancho Panza – who incidentally never boasted of this – succeeded in the course of the years, by supplying numerous romances of chivalry and banditry during the evening and night hours, in diverting his devil – to which he later gave the name Don Quixote – so effectively from himself that this devil thereafter, quite out of control, performed the craziest of deeds, which however for lack of their predestined object, which should have been precisely Sancho Panza, did nobody any harm. Sancho Panza, a free man, followed this Don Quixote imperturbably, perhaps from a certain sense of responsibility, and he found great and profitable entertainment therein to the end of his days (KAFKA, 1991, p. 100).

The modest Sancho Panza<sup>55</sup>, “the burden removed from his back” (BENJAMIN, 1968, p. 140, trans. Modified) begins a new journey. A “free man”, Sancho Panza is liberated from his tormentor, entering into a new relationship with Don Quixote, who is no longer violent, but rather amusing. He achieves this by supplying him with fantastical literature. In this way, Franz Kafka fights, supplying law with literature, *suaviter in modo, fortiter in re* for a new law; a law which is practised ascetically, and which restrains itself in order to make place for life. By holding up the mirror to the law, Kafka, the writer as true jurispudent, mercilessly confronts us with the facts: we can only escape the swamplands through which our society wades if we dry them out ourselves. Like Münchhausen, we will have to pull ourselves out of the morass by the tuft of our own hair. Childlike play, patience, modesty, cunning, mischief, wit and irony: the combative message of the gentle Franz Kafka is that it is only by non-violent means that the order of violence can be supplanted by a new form of sociality and of law – one which does not divide, but rather connects, which does not level off differences, but rather respects them, and which is not limitless, but ascetic.




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<sup>55</sup> Sancho Panza serving temporary as governor of the island Barataria was a just (“In a word, he made so many good rules that to this day they are preserved there, and are called The constitutions of the great governor Sancho Panza” (CERVANTES, 2015, part II, chap. 51)) but unwilling legislator and judge (“Make way, gentlemen, and let me go back to my old freedom; let me go look for my past life, and raise myself up from this present death. I was not born to be a governor” - id., part II, chap 53). For details concerning justice at Barataria see Horazio Chiong Rivero, “Ínsula de buen gobierno: el palimpsesto guevariano en ‘Las Constituciones del gran gobernador Sancho Panza’”, in: *Cervantes: Bulletin of the Cervantes Society of America* 28/2008, p. 135-65.



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Recebido em: 10/07/2016

Autor convidado